NO. 87-23

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LLOYD O. LONG, M.D., *Appellant*

v.

BRADLEY M. HARRISON, a Minor, by and through his Next Friends and Natural Parents, MICHAEL L. and MARLA K. HARRISON, and MICHAEL L. and MARLA K. HARRISON, *Appellees,*

v.

FLETCHER BELL, Commissioner of Insurance, State of Kansas, *Intervener/Appellee.*

ON APPEAL FROM THE SUPREME COURT OF KANSAS

JURISDICTIONAL STATEMENT

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June 25, 1987

Question Presented

Whether the Kansas Health Care Provider Insurance Act, as contained in K.S.A. Section 40-3401, et seq. (1981), is unconstitutional in that it violates the Fourteenth Amendment due process clause of the United States Constitution by depriving a physician of his constitutionally-protected property right to defend himself in Court.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

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No. _____

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LLOYD O. LONG, M.D., Appellant,

v.

BRADLEY M. HARRISON, a Minor, by and through his Next Friends and Natural Parents, MICHAEL L. and MARLA K. HARRISON, and MICHAEL L. and MARLA K. HARRISON, Appellees,

v.

FLETCHER BELL, Commissioner of Insurance, State of Kansas, Intervener/Appellee.

—————o—————

ON APPEAL FROM THE SUPREME COURT OF KANSAS

—————o—————

JURISDICTIONAL STATEMENT

Lloyd O. Long, M.D., appeals from the final judgment of the Supreme Court of Kansas, dated March 27, 1987, holding that the provisions of the Kansas Health Care Provider Insurance Act (K.S.A. 40-3401, *et seq.)* do not deprive a health care provider of a property right, *i.e.*, the right to defend an action, or a due process right, and that the Act does not violate the Fourteenth Amendment to the United States Constitution or Section 18 of the Bill of Rights of the Kansas Constitution.

OPINIONS BELOW

The opinion of the Supreme Court of Kansas which appears in the Appendix hereto, p. 1a, *infra,* is reported at 734 P. 2d 1155 (Kan. 1987).

The Journal Entry denying Appellant's Motion for Relief from the original Journal Entry approving the settlement agreement reached between the Appellees, Appellant's insurance carrier, St. Paul Fire and Marine Insurance Company and the Kansas Health Care Stabilization Fund, dated June 16, 1986, is not reported. It is reprinted in the Appendix hereto, p. 10 a, *infra.*

JURISDICTION

The judgment of the Supreme Court of Kansas, affirming the ruling of the Sherman County District Court, was entered on March 27, 1987.

This appeal is being docketed in this Court within ninety days from the filing of the Supreme Court of Kansas opinion. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(2).

QUESTION PRESENTED

Whether the Kansas Health Care Provider Insurance Act, as contained in K.S.A. § 40-3401, *et seq.* (1981), is unconstitutional in that it violates the Fourteenth Amendment due process clause of the United States Constitution by depriving a physician of his constitutionally-protected property right to defend himself in Court.

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, Section 1, United States Constitution

Section 18, Bill of Rights, Kansas Constitution

Kansas Statutes Annotated, § 40-3401, *et seq.* (1981)

All statutes are set forth in full in the Appendix to this Jurisdictional Statement.

RAISING THE FEDERAL QUESTION

In Appellant's Motion for Relief from Journal Entry, Appellant raised the issue that the Kansas Health Care Provider Insurance Act violated the Fourteenth Amendment due process clause of the United States Constitution. The Journal Entry entered by the District Court of Sherman County, dated June 16, 1986, held that the Kansas Health Care Provider Insurance Act did not violate the Fourteenth Amendment due process clause of the United

States Constitution, in that it did not deprive Appellant of his constitutionally-protected property rights.

The Fourteenth Amendment claim was reiterated by Appellant before the Supreme Court of Kansas. The question presented on appeal was whether the Kansas Health Care Provider Insurance Act, as contained in K.S.A. § 40-3401, *et seq.* (1981), was unconstitutional in that it violated the Fourteenth Amendment due process clause of the United States Constitution by depriving a physician of his constitutionally-protected property right to defend himself in court. The Kansas Supreme Court affirmed the district court ruling. It thus considered and expressly rejected Appellant's federal constitution claim.

STATEMENT OF THE CASE

The Appellant, Lloyd O. Long, M.D., is a physician licensed to practice medicine in the State of Kansas. Appellant has as his primary place of residence, Sherman County, Kansas.

In January, 1983, Appellant was the pediatrician for Appellee Bradley M. Harrison. As a result of Appellant's treatment of Bradley Harrison, he was sued for medical malpractice. Appellant's insurance carrier, St. Paul Fire and Marine Insurance Company, the Appellees and the Kansas Health Care Stabilization Fund, pursuant to K.S.A. § 40-3401 *et seq.* (1981), settled the lawsuit without Appellant's consent.

On June 19, 1985, the District Court of Sherman County, Kansas, entered its journal entry approving the settlement reached between the parties. On June 28, 1985, Appellant filed his Motion for Relief from Journal Entry,

claiming that K.S.A. § 40-3401 *et seq.* (1981) was unconstitutional in that it violated the Fourteenth Amendment Due Process Clause of the United States Constitution by depriving Appellant of his constitutionally-protected property right to defend himself in court. Appellant's Motion for Relief from Journal Entry was denied on June 16, 1986.

Appellant filed his Notice of Appeal to the Supreme Court of Kansas claiming that the Kansas Health Care Provider Insurance Act as contained in K.S.A. § 40-3401 *et seq.* (1981), was unconstitutional in that it violated his Fourteenth Amendment Due Process rights. On March 27, 1987, the Supreme Court of Kansas affirmed the District Court's denial of Appellant's Motion for Relief from Journal Entry, holding that the provisions of the Kansas Health Care Provider Insurance Act (K.S.A. § 40-3401 *et seq.* [1981]) do not deprive a health care provider of a property right, *i.e.*, the right to defend an action, or a due process right. The Supreme Court of Kansas held that the Act did not violate the Fourteenth Amendment to United States Constitution or Section 18 of the Bill of Rights of the Kansas Constitution.

THE QUESTION IS SUBSTANTIAL

The question as to whether the Kansas Health Care Provider Insurance Act is unconstitutional in that it seeks to deprive a physician of his Fourteenth Amendment due process right to defend himself in Court is a novel and substantial one. It is a question which appears to have never been treated before by this Court.

The Kansas Health Care Provider Insurance Act, K.S.A. § 40-3401. *et seq.* (1981), establishes insurance requirements for health care providers. The statute re-

quires every health care provider to maintain medical malpractice insurance as a condition to rendering medical services in Kansas. The Act establishes the minimum insurance coverage and also establishes the Kansas Health Care Stabilization Fund (the "Fund"). The Fund was established for the purpose of paying damages for personal injuries or death arising out of the rendering or the failure to render professional services by a health care provider. The Fund is required to pay judgments or settlements which exceed the basic liability coverage provided by private insurers for all resident health care providers. K.S.A. § 40-3403. Should a private insurer agree to settle a claim against its insured for its policy limits, the claimant and the insurance commissioner are authorized to negotiate an amount to be paid from the Fund to satisfy the balance of the claim. K.S.A. § 40-3410. If the claimant and commissioner agree upon an amount, the statute provides for a petition to be filed with the Court for approval of the agreement, and for a hearing to be held by the Court prior to approving the proposed settlement. In order to approve the settlement, the Court must find the agreement to be valid, just and equitable. K.S.A. § 40-3410. Nowhere in these procedures is the consent of the insured to the settlement required.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in part that ". . . or shall any state deprive any person of rights, liberty, or property without due process of law . . ." Procedural due process contemplates that when life, liberty or property are taken by the government, it is required to act with procedural correctness. Analyzing a due process argument, the first question considered is whether there is a liberty or property

interest at stake, and if so, the second question is what "process" is due. A property interest is an interest that a person has already acquired in specific benefits. There must be a "legitimate claim of entitlement." *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2702, 33 L. Ed. 2d 548 (1972). The claim of entitlement must be found in state law. In addition, the United States Constitution requires that a state may not take away without due process what it has previously granted.

Appellant's state-created property right stems from the Constitution of the State of Kansas, Bill of Rights, Section 18. The text of Section 18 provides:

> *Justice without delay.* All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.

"Remedy by due course of law" has been defined as reparation for injury ordered by a tribunal having jurisdiction in due course of procedure, after a fair hearing. *Neeley v. St. Francis Hospital and School of Nursing, Inc.*, 192 Kan. 716, 391 P. 2d 155 (1964); *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P. 2d 934 (1954). Appellant, in the case below, claimed that the procedural scheme laid out in the Act deprived him of the right to have a remedy imposed in due course of procedure after a fair and meaningful hearing for the injury to his reputation which resulted from the malpractice claim filed by Appellees.

The Kansas Health Care Provider Insurance Act acts to completely sever a physician's right to have a meaningful hearing to defend a malpractice claim against him. The Act takes "property" from the physician that he is otherwise guaranteed by the Kansas and Federal Constitutions.

Minimum procedural requirements are a matter of federal law, and may not be diminished by the fact that a state may have specified procedures that it deems adequate for determining preconditions to adverse action. A state may freely legislate regarding substance, but federal procedural requirements are inviolate. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S. Ct. 1148, 1 L. Ed. 2d 265 (1982). The Kansas legislature has attempted to establish a separate and lesser set of procedural safeguards for the Kansas Health Care Stabilization Fund. These inadequate state safeguards must give way in the face of federal due process standards.

Kansas has elected to impose financial restrictions on physicians in such a way as to subject Appellant to being branded with a malpractice label. Appellant's Fourteenth Amendment due process contention is a substantial one which has been raised on the record in this case.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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June 25, 1987

APPENDIX

OPINIONS BELOW

1. SUPREME COURT OF KANSAS

No. 59,739

BRADLEY M. HARRISON, a Minor,
by and through his Next Friends and Natural Parents,
MICHAEL L. and MARLA K. HARRISON, and
MICHAEL L. and MARLA K. HARRISON,
Plaintiffs-Appellees,

v.

LLOYD O. LONG, M.D.,
Defendant-Appellant.

SYLLABUS BY THE COURT

1. "Standing to sue" means that a party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. *Dutoit u Board of Johnson County Comm'rs,* 233 Kan. 995, 1003, 667 P. 2d 879 (1983).

2. Under the Kansas Code of Civil Procedure, a defendant has no absolute right to prevent a voluntary dismissal of the plaintiff's action unless the defendant asserts a counterclaim against the plaintiff. K.S.A. §

60-241(a). A defendant has no constitutionally protected right to require that a plaintiff's action continue for the sole purpose of allowing the defendant to vindicate himself.

3. The provisions of the Kansas Health Care Provider Insurance Act (K.S.A. § 40-3401, *et seq.* [Ensley 1981]) do not deprive a health care provider of a property right, *i.e.*, the right to defend an action, or a due process right. The Act does not violate the Fourteenth Amendment to the U.S. Constitution or Section 18 of the Bill of Rights of the Kansas Constitution.

Appeal from Sherman district court; JACK C. BURR, judge. Opinion filed March 27, 1987. Affirmed.

Laurin D. Quiat, of Cogswell and Wehrle, of Denver, Colorado, argued the cause, and Martha C. Reps, of the same firm, and Jeffrey A. Mason, of Foust and Vignery, of Goodland, were with him on the briefs for appellant.

Thomas L. Theis, of Sloan, Listrom, Eisenbarth, Sloan and Glassman of Topeka, argued the cause and Jeffrey W. Jones, of the same firm, and Derenda J. Mitchell, of Kansas Insurance Department, of Topeka, were with him on the brief for intervenor Fletcher Bell, Commissioner of Insurance.

No appearance by appellees.

The opinion of the court was delivered by:

LOCKETT, J: The appellant, Lloyd O. Long, M.D., a licensed physician, challenges the constitutionality of the Kansas Health Care Provider Insurance Act, K.S.A. § 40-3401, *et seq.* (Ensley 1981). Dr. Long contends that the Act deprived him of a property right — the right to defend himself. The district court found the Act constitutional. Dr. Long appeals.

Dr. Long is a physician licensed to practice medicine in Kansas. On June 20, 1984, Bradley M. Harrison, by and through his parents, filed a medical malpractice action against Dr. Long in Sherman County District Court. The action arose out of Dr. Long's medical treatment of Bradley in February of 1983.

After investigating the medical malpractice claim against Dr. Long, Long's insurance carrier, St. Paul Fire and Marine Insurance Company (St. Paul), determined to settle its liability rather than defend the claim against Dr. Long. St. Paul notified the Kansas Health Care Stabilization Fund (Fund) of its decision. The Fund and the claimant then entered into negotiations and reached a settlement.

The settlement was approved by the Sherman County District Court over Dr. Long's objections. Dr. Long filed a motion for relief from the journal entry contending that part of the Kansas Health Care Provider Insurance Act, which allows the Fund to settle actions over the objections of the defendant physician, is unconstitutional. The district court found the Act constitutional. Dr. Long appeals. The Fund was allowed to intervene in the appeal.

The Act was passed by the 1976 legislature as a partial response to the increasing pressure of what was termed a national medical malpractice crisis. Although repeatedly amended since its enactment, statutory references to the Act in this opinion will be to K.S.A. § 40-3401, *et seq.* (Ensley 1981), which was in effect when this cause of action arose. Under the Act, every resident health care provider, including physicians, is required to maintain a policy of professional liability insurance with a minimum liability of $100,000 per occurrence and $300,000 annual

aggregate. (After July 1, 1984, the minimum liability limit was increased to $200,000 and $600,000.) K.S.A. 40-3402(a). The Fund is responsible for paying that amount of any judgment in excess of the basic coverage of the resident health care provider. K.S.A. § 40-3403(b)(1). The resident health care providers pay an annual surcharge to the Fund to qualify for the excess coverage. K.S.A. 40-3404(a).

If a physician is sued for medical malpractice, his liability insurer initially defends the action. If the physician's basic insurer agrees to tender the limits of its coverage to settle a claim, but that claim exceeds the amount of such coverage, the insurance commissioner is authorized to negotiate with the claimant an amount in excess of the liability insurer's coverage to be paid out of the Fund. In the event the Fund and the claimant agree upon the amount of compensation to be paid by the Fund, the claimant must then file a petition in the court where the underlying action is pending for approval of the agreement. Following a hearing, the court may approve the settlement between the claimant and the Fund if the settlement is found to be valid, just, and equitable. K.S.A. § 40-3410.

1. Standing

The Fund claims that Dr. Long has no standing to appeal because, under the settlement agreement, St. Paul and the Fund are responsible for the payment to the claimant. The Fund argues that standing requires the coexistence of three factors: (1) injury in fact to the party; (2) "individuated" injury; and (3) causation in fact, citing *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 57 L. Ed. 2d 595, 98 S. Ct. 2620 (1978). The Fund maintains

that because Dr. Long is without injury, he has no standing to sue.

Standing has been called one of the most amorphous concepts in the entire domain of public law. Annot., 50 L. Ed. 2d 902, 904. The United States Supreme Court has stated that, in its constitutional dimension, standing imparts justiciability: whether the plaintiff has made out a case or controversy between himself and the defendant within the meaning of Article III of the U.S. Constitution. The court has emphasized that this is the threshold question in every federal case determining the power of the court to entertain the suit. *Warth v. Seldin,* 422 U.S 490, 498, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975).

Standing is a question of whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of jurisdiction and to justify exercise of the court's remedial powers on his behalf. *Warth v. Seldin,* 422 U.S. at 498-99. "Standing to sue" means that a party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. *Dutoit v. Board of Johnson County Comm'rs,* 233 Kan. 995, 1003, 667 P. 2d 879 (1983). To have standing, Dr. Long must show that he personally suffered some injury and that there was some causal connection between the claimed injury and the challenged conduct.

Dr. Long argues that he has standing to challenge the constitutionality of the Act because he has sustained actual injury as a result of the settlement of the suit. He contends the settlement approved by the court resulted in an increase of his annual surcharge to the Fund by 400 percent since 1984 and, in addition, has caused injury to his reputation at the local hospitals. On future malpractice

insurance applications, he is required to report any suits that have been filed against him for malpractice and the resulting settlements of those suits. Dr. Long argues that, but for the Act, he would have had an opportunity to defend himself and present his defense to the alleged malpractice in a court of law.

Under these circumstances, Dr. Long has a sufficient stake in the justiciable controversy to obtain judicial resolution of the controversy.

2. Property Rights

Dr. Long contends that the Act deprives him of a property right — the right to defend himself in court — and since the constitution of this state has made access to the courts an entitlement, the legislature may not now deprive him of his right to defend himself by denying him such access. The Fund contends that the right to defend oneself in court is not a protected property interest.

When reviewing the constitutionality of a statute, the appellate court must presume the statute is constitutional; all doubts must be resolved in favor of the statute's validity; and before a statute may be stricken down, it must be clearly shown that it violates the Constitution. It is the court's duty to uphold the statute under challenge, if possible, rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that must be done. *Lakeside Village Improvement Dist. v. Jefferson County,* 237 Kan. 106, 697 P. 2d 1286 (1985).

The Fourteenth Amendment to the United States Constitution provides that no state can "deprive any person of life, liberty, or property, without due process of law."

Section 18 of the Bill of Rights of the Kansas Constitution provides:

> **"Justice without Delay.** All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."

When an interest involving life, liberty, and property is implicated, the right to some kind of prior hearing is mandated because of the due process considerations emanating from the Fourteenth Amendment. However, a protected due process right must encompass the type of interest recognized under the due process clause of the Fourteenth Amendment. *Sinclair v. Schroeder,* 225 Kan. 3, 8, 586 P. 2d 683 (1978).

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. *Board of Regents v. Roth,* 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972).

"Property," as that term has been construed within the constitutional guaranty against the deprivation of property without due process, includes various rights and interests, such as a cause of action, including a chose in action; contract rights, including possessory interests in a chattel under a conditional sales contract; a franchise; a future vested estate; the respective rights of income account and principal account under a trust; patent rights; trade secrets; the good will of a business; and an interest in real property. 16C C.J.S., Constitutional Law 984.

The due process clause protects vested rights only and has no reference to mere concessions or privileges which the public authorities may control, and bestow, or withhold at will. Interests which have been held not to be protected by the due process clause include actions for wrongful death, environmental concerns of a general nature, interests in the selection of a trustee, the rights of an unsuccessful bidder for government benefits, a right to a favorable advisory opinion, the right to malpractice insurance, the interests of members in a charitable society, rights in a reputation, utility rates and medical insurance rates. 16C C.J.S., Constitutional Law 985.

Dr. Long argues that Section 18 of the Kansas Bill of Rights makes justice "by due course of law" the public policy of the state; therefore, it creates a protected property right to defend oneself in court against a civil claim for damages. We do not agree.

The constitutional provision guaranteeing to every person a remedy by due course of law for injury done him in person or property means that for such wrongs that are recognized by the law of the land the court shall be open and afford a remedy, or that laws shall be enacted giving a certain remedy for all injuries or wrongs. "Remedy by due course of law," so used, means the reparation for injury ordered by a tribunal having jurisdiction in due course of procedure after a fair hearing. *Neely v. St. Francis Hospital & School of Nursing,* 192 Kan. 716, 719, 391 P. 2d 155 (1964).

The right to a cause of action has long been held to be a protected property interest. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982). "[T]he ... Due Process Clause has been interpreted

as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s].'" 455 U.S. at 429-30.

There are no cases, however, holding that the right to defend oneself in a civil case is a protected property interest. The common law and the Kansas Code of Civil Procedure both recognize that a plaintiff has the right of action and may dismiss his complaint at law or his bill in equity unless some plain legal prejudice would result to the defendant other than the mere prospect of a second litigation upon the subject matter. A defendant has no absolute right to prevent a voluntary dismissal of the plaintiff's action unless the defendant asserts a counterclaim against the plaintiff. K.S.A. 60-241(a).

A defendant has no constitutionally protected right to require that a plaintiff's action continue for the sole purpose of allowing the defendant to vindicate himself. Under the circumstances, Dr. Long has no constitutionally protected property right to defend himself in court.

3. Due Process Rights

Dr. Long claims that he was deprived of his right to defend himself when the Act became effective. We do not agree. Neither the Fourteenth Amendment to the United States Constitution nor Section 18 of the Kansas Bill of Rights constitutionally prohibits changes in the law which affect a person's rights as they existed at common law. *State ex rel. Schneider u Liggett,* 223 Kan. 610, 613, 576 P. 2d 221 (1978). While Section 18 provides a broad field for the protection of person, property, and reputation, the

vested rights contained therein are subject to change by legislative power, where the change is reasonably necessary in the public interest to promote the general welfare of the people of the state. *Manzanares v. Bell*, 214 Kan. 589, 599, 522 P. 2d 1291 (1974).

Dr. Long claims that the right to defend oneself in court is a procedural due process right guaranteed every individual under the Fourteenth Amendment. The Fund counters that (1) if he has such right, Dr. Long waived his procedural right to object to the settlement by the Fund under his contract with St. Paul, and (2) he has no due process property right to defend himself; therefore, the Act does not deprive him of any procedural due process right.

The Act requires Dr Long to maintain professional liability insurance as a condition of rendering service in this state. Dr. Long contracted with St. Paul for the liability coverage that contained a limitation on the coverage and an agreement that his insurance company could defend or settle any claim covered by the policy without the consent of the doctor. Here, under its contract, St. Paul chose not to defend the Harrisons' claim against Dr. Long but agreed to settle its liability to the claimant within the policy limits and notified the Fund of its intention. The insurance commissioner under the Act was then entitled to negotiate an amount to be paid from the Fund as a settlement or continue to defend the action against Dr. Long. Unlike Dr. Long's contract with his liability carrier, the Act contains no explicit waiver or consent provision which allows the Fund to settle the action with the claimant without the consent of the health care provider.

The power of the State to regulate and license professions is not limited to fitness to practice, but may also

include requirements to protect and promote the public health, safety, morals, peace, quiet, and law and order. It is the public policy of the State to assure an adequate supply of health care providers and provide protection to patients who may be injured as a result of medical malpractice. Under the Act, it is the Fund, not the provider, which is responsible for paying any difference above the coverage of the liability insurance. It is, therefore, implicit in the Act that the provider relinquish his right to prevent a settlement. To allow physicians to control the defense of malpractice claims against them and reach their own decisions to continue or to settle the action would undermine the whole purpose and the financial structure of the Act.

The Fund also argues that the Act adequately protects Dr. Long's due process rights. To determine the constitutional adequacy of the Act's procedures, identification of the specific dictates of due process generally requires consideration of three distinct factors: (1) the private interest that will be affected by the Act; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976).

The Act provides certain procedural protections to the provider. K.S.A. 40-3410 provides that once the claimant and the commissioner reach a settlement, a petition is filed by the claimant with the court for approval of the agreement. The court then conducts a hearing at which the

claimant, the health care provider and the Fund may appear. If the court finds the settlement valid, just and equitable, it will approve the settlement. If the settlement is not approved, the court orders the action to proceed. K.S.A. § 40-3411.

Under the procedural framework of the Act, a health care provider is given the opportunity to represent his interests to the court at the settlement hearing, thus maintaining his procedural due process rights under the Act.

St. Paul and the Fund settled the claim against the physician without any personal liability to Dr. Long. Dr. Long has no right to complain because the action was settled, if the State had a significant overriding countervailing interest.

There is no individual due process right where the State has a countervailing interest of overriding significance. See *State ex rel. Schneider v. Liggett*, 223 Kan. 610. In *Liggett*, this court found that mandatory malpractice insurance bears a rational relationship to the health and welfare of the citizens of this state by not only providing protection to patients who may be injured as a result of medical malpractice, but by assuring that there continues to exist in the state an adequate supply of health care providers. For the same reasons, the provisions of the Act now questioned by Dr. Long are upheld as they provide an overriding state interest in maintaining adequate health care providers in the state, as well as providing sufficient amounts to cover the economic costs of a claimant's injuries caused by medical malpractice.

The provisions of the Kansas Health Care Provider

Insurance Act (K.S.A. § 40-3401, *et seq.* [Ensley 1981]) do not deprive a health care provider of a property right, *i.e.*, the right to defend an action, or a due process right. The Act does not violate the Fourteenth Amendment to the United States Constitution or Section 18 of the Bill of Rights of the Kansas Constitution.

Affirmed.

———o———

2. SHERMAN COUNTY DISTRICT COURT

IN THE DISTRICT COURT OF SHERMAN COUNTY, KANSAS
FILED PURSUANT TO CHAPTER 60
OF THE KANSAS STATUTES ANNOTATED

BRADLEY M. HARRISON, a minor,
by and through his Next Friends and Natural Parents,
MICHAEL L. and MARLA K. HARRISON,

and

MICHAEL L. and MARLA K. HARRISON,
individually,

plaintiffs,

vs. Case No. 84 C 92

LLOYD O. LONG, MD,

defendant.

JOURNAL ENTRY

NOW, on this 12th day of May, 1986, comes on for hearing the Motion of the defendant for relief from Journal Entry. The plaintiffs appear by and through their counsel, Kyle L. Larson. The defendant appears personally and by and through his attorney, Jeffrey A. Mason of FOUST & VIGNERY, Goodland, Kansas, and Laurin D. Quiat of Cogswell and Wehrle, Denver, Colorado. The Health Care Stabilization Fund appears by and through its counsel, Thomas L. Theis and Derenda Mitchell. Also appearing is B.G. Larson. The Honorable Jack L. Burr is present and presides.

Thereupon, Mr. Mason moves for the admission of Mr. Quiat, pursuant to Supreme Court Rule No. 116 for the purposes of this hearing, and all further proceedings in this case. After hearing statements of counsel, and being well and truely (sic) advised in the premises, the Court finds that Laurin D. Quiat of Cogswell and Wehrle, Denver, Colorado, should be admitted, pursuant to Supreme Court Rule No. 116 for the purposes of this hearing, and all further proceedings.

After hearing statements of counsel, reviewing the briefs of the parties, and being well and truely (sic) advised in the premises, the Court finds that the Kansas Health Care Provider Insurance Act contained in K.S.A. § 40-3401, *et seq.* is constitutional and that by reason thereof, the defendant's Motion for Relief from Journal Entry is denied. The Court adopts and incorporates herein by reference it (sic) comments on the record in ruling on the Motion as its findings in fact and conclusions of law with respect to its ruling.

IT IS THEREFORE BY THE COURT, CONSIDERED, ORDERED, ADJUDGED AND DECREED, that the defendant's Motion for Relief from the Journal Entry is and the same is hereby denied.

DATED: *6/16/86* */s/*
Jack L. Burr
Associate District Judge

APPROVED:

SLOAN, LISTROM, EISENBARTH, SLOAN, AND GLASSMAN

BY: */s/*
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3. Section One of the Fourteenth Amendment to the United States Constitution reads as follows:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of rights, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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4. The Constitution of the State of Kansas, Bill of Rights, Section 18 reads as follows:

Justice without Delay. All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.

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5. Kansas Statutes Annotated (K.S.A.) § 40-3401:

(e) "Fund" means the health care stabilization fund established pursuant to subsection (a) of K.S.A. 40-3403 and amendments thereto.

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6. K.S.A. § 40-3403:

(a) For the purpose of paying damages for personal injury or death arising out of the rendering of or the failure to render professional services by a health care provider, self-insurer or inactive health care provider subsequent to the time that such health care provider or self-insurer has

qualified for coverage under the provisions of this act, there is hereby established the health care stabilization fund. The fund shall be held in trust in a segregated fund in the state treasury. The commissioner shall administer the fund or contract for the administration of the fund with an insurance company authorized to do business in this state.

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7. K.S.A. § 40-3404a:

Surcharge amount; experience rating. The commissioner shall establish by rules and regulations an experience rating system to become effective on July 1, 1987, that requires a higher surcharge from health care providers based upon past claims paid from the fund on behalf of such providers. In establishing such rating system, the commissioner shall give consideration to the number, size and frequency of the claims paid, and the classification of the health care provider, from the date the fund was established. The commissioner shall provide, upon written request of any health care provider, a written statement showing the basis for the experience rating of such health care provider.

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8. K.S.A. § 40-3410:

Negotiation of amount of claim to be paid from fund; settlement; procedure for court approval. When the insurer of a health care provider or inactive health care provider covered by the fund has agreed to settle its liability on a claim against its insured or when the self-insurer has agreed to settle liability on a claim and the claimant's demand is in an amount in excess of such settlement, or where a claim is against an inactive health care provider

covered by the fund who does not have liability insurance in effect which is applicable to the claim, or where it would otherwise be in the best interest of the fund, the claimant and the commissioner may negotiate on an amount to be paid from the fund. The commissioner may employ independent counsel to represent the interest of the fund in any such negotiations. In the event the claimant and the commissioner agree upon an amount the following procedure shall be followed:

(a) A petition shall be filed by the claimant with the Court in which the action is pending against the health care provider or the inactive health care provider, or if none is pending, in a court of appropriate jurisdiction, for approval of the agreement between the claimant and the commissioner.

(c) At such hearing the court shall approve the proposed settlement if the court finds it to be valid, just and equitable.

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9. Notice of Appeal to the Supreme Court of the United States.

IN THE SUPREME COURT
STATE OF KANSAS

LLOYD O. LONG, M.D.
Appellant,

v.

BRADLEY M. HARRISON, a minor, by and through his next friends and natural parents, MICHAEL L. and MARLA K. HARRISON, and MICHAEL L. and MARLA K. HARRISON,
Appellees.

NO. 59,739

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NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Lloyd O. Long, M.D., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Kansas, affirming the trial court, entered in this action on March 27, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

Respectfully submitted,

FOUST AND VIGNERY

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CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of June, 1987 placed a true and correct copy of the foregoing pleading in the U.S. Mail, postage prepaid, addressed as follows:

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